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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

CARTER ZELEZNIK, ADMINISTRATOR
OF THE ESTATE OF ARNOLD F. ZELEZNIK,
Petitioner

vs.

COMMONWEALTH OF MASSACHUSETTS
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent, Commonwealth of Massachusetts, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Supreme Judicial Court in this case.

The respondent accepts petitioner's statement of jurisdiction, citation of opinions below, and citation of applicable

constitutional provisions and statutes.

QUESTIONS PRESENTED

1. Whether the refusal of the Massachusetts Courts to expand their definition of nuisance to include the circumstances of this case amounts to a substantial federal question.

2. Whether this Court should review the constitutionality of state sovereign immunity from tort suit where the Legislature of the Commonwealth has already acted to abrogate that immunity.

3. Whether this Court should review this case where no federal question has been decided by any of the state courts and the petitioner's claims against the

individual defendants have not been resolved.

4. Whether the decision of the Legislature of the Commonwealth of Massachusetts to abrogate sovereign immunity retroactively to a date not encompassing this cause of action violates the Equal Protection or Due Process clauses of the Fourteenth Amendment.

STATEMENT OF THE CASE

This petition arises out of an action in tort brought in March of 1975 against the Commonwealth of Massachusetts and certain of its employees at the Northampton State Hospital, a state facility. The tort

claims are for the wrongful death and pain and suffering of nine year old Arnold Zeleznik, who was killed in Florida in December of 1974 by Vernal Walford. Walford had been treated as a mental patient at the state hospital between November 25 and November 27, 1974, and was allegedly negligently treated and discharged from the hospital by one or more of the defendants.

The Commonwealth of Massachusetts was granted summary judgment in its favor based on a defense of the Commonwealth's longstanding immunity from tort suit. The order for summary judgment was entered at the direction of the Massachusetts Appeals Court (App. 4a), which had reviewed the case on a report from the trial court of

the question of whether or not sovereign immunity should be abrogated in this case. (App. 9a - 11a)

The Appeals Court initially found that the report presented no constitutional questions, (App. 4a), and later dismissed a new appeal from the same judgment it had ordered be entered. (App. 3a) The Supreme Judicial of Massachusetts has declined to review the Appeals Court Order. (App. 1a, 6a, 7a, 8a).

REASONS FOR NOT GRANTING CERTIORARI

I. WHETHER THE PETITIONER ALLEGED A CLAIM OF NUISANCE ON THE FACTS OF THIS CASE IS PURELY A QUESTION OF STATE LAW AND NOT REVIEWABLE BY THIS COURT ON CERTIORARI.

The death in this case occurred on November 27, 1974. On May 13, 1973, the Massachusetts Supreme Judicial Court ruled that the Commonwealth would no longer be immune from suit for the creation or maintenance of a private nuisance, notwithstanding a long history of application of the common law doctrine of governmental immunity from tort suits. Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 296 NE2d 461 (1973). That decision left the Commonwealth's immunity otherwise intact, but suggested that there were persuasive reasons why the

governmental immunity doctrine should be abolished by the legislature. The petitioner now argues this is a nuisance suit against the Commonwealth which its courts had to entertain under the rationale of the Morash decision. Insofar as that issue is presented on the record in this matter (and there is no indication that any Massachusetts court ever ruled on it), it is a question of state law and therefore does not fall within this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). See, e.g., Martinez v. California, 444 U.S. 277, 282 (1980), where this Court noted that:

> "the State's interest in fashioning its own rules of tort law is paramount to any federal interest, except perhaps an interest in protecting the individual citizen from state action

that is wholly arbitrary or irrational."

II. THE ISSUE OF THE CONSTITUTIONALITY OF THE DOCTRINE OF SOVEREIGN IMMUNITY IS MOOT.

As related by the petitioner, the Massachusetts Legislature did act to abrogate the doctrine of sovereign immunity to permit the state to be sued in tort in 1978. Massachusetts General Laws Chapter 258 (App. 17a et. seq.). Because the immunity no longer exists, there is no occasion for this Court to review its constitutionality.

III. THE CONSTITUTIONALITY OF THE RETROACTIVE APPLICATION OF THE ABROGATION OF THE COMMONWEALTH'S IMMUNITY FROM TORT SUIT SO THAT IT EXCLUDES CAUSES OF ACTION ARISING BEFORE AUGUST 16, 1977 WAS NOT DECIDED BY THE STATE COURTS AND THEREFORE SHOULD NOT BE REVIEWED.

The petitioner also argues that the Massachusetts Legislature, by not making its abrogation of governmental immunity retroactive to the date of the Morash decision, violated his Fourteenth Amendment rights to due process and equal protection, since this suit arose before the effective date of the abrogation (but after Morash).

The decisions and orders of the state courts contained in petitioner's appendix make it clear that these purported federal questions were never decided by the state courts. If they were ever even raised at the proper stage in the proceedings, petitioner has failed to designate in what manner and when.

The only state court to issue any substantive reasons for its decision found

that no constitutional question had been properly presented for its review. See Order of Massachusetts Appeals Court dated June 28, 1979. (App. 4a).

That court also refused appellate review because no action had been taken on motions for summary judgment of the individual employee defendants in this suit. Id. The claims against these individuals remain unresolved as of this date. Should they ultimately be found not liable, it is probable that there would also be no liability on the part of the Commonwealth, even absent a defense of sovereign immunity.

IV. IT WAS CONSTITUTIONAL FOR THE MASSACHUSETTS LEGISLATURE TO ABROGATE SOVEREIGN IMMUNITY RETROACTIVELY TO AUGUST 16, 1977, THE DATE WHEN THE MASSACHUSETTS SUPREME JUDICIAL COURT ANNOUNCED THAT IT WOULD ABOLISH IMMUNITY IF THE LEGISLATURE DECLINED TO ACT.

Regardless of whether or not the asserted constitutional questions concerning retroactivity were properly raised in the state court, they have no merit.

It is within the inherent power of the highest court of a state to give a decision prospective or retrospective application without offending constitutional principles. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 365-366 (1932). There is no reason why legislatively created changes in state

law should have a different constitutional status.

Here the retroactive change in the law did not deprive petitioner of some benefit to which he was formerly entitled; instead, it granted newly created rights of suit against the Commonwealth to persons whose causes of action had arisen after August 16, 1977. This was the date the Supreme Judicial Court had decided to announce its intention to abrogate governmental immunity in appropriate future cases if the Legislature failed to take action in 1978. Whitney v. Worcester, 373 Mass. 208, 366 NE2d 1210 (1977). Although that court indicated that if it was left to act it would make the abrogation retroactive to the date of the 1973 Morash decision, it

emphasized the primacy of the Legislature's role in the abrogation process. 373 Mass. at 210, 366 NE2d at 1212.

When the Legislature did take action, it was not at all irrational or arbitrary for it to conclude that making the new "Tort Claims Act" retroactive over a period of five years would create chaos as far as distinquishing between cases which had been terminated, those which were on appeal but had already been tried, and those which were still at pretrial stages. It was entirely reasonable for the lawmakers to conclude that only after the Whitney decision was anyone entitled to rely on an expectation that the immunity would be abrogated. Finally, it was within the Legislature's power to determine that a

longer period of retroactivity would place an unanticipated and severe strain on the budgets of governmental bodies.

Since a limitation on recovery of damages in tort does not impinge on a constitutionally protected substantive right and is not predicated on a suspect classification, any classification created thereby is valid unless it rests on grounds wholly irrelevant to the achievement of any legitimate governmental objective. Harris v. McRae, 448 U.S. , 101 S. Ct. 39 (1980). Therefore, the classification based on date of injury created by the Massachusetts statute does not violate the Equal Protection clause. Similarly, this case involving only an asserted right to sue a particular party for money damages

does not create a substantial federal question of violation of due process.

CONCLUSION

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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